IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1568

J. FRANK KELLY, INC., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

CHARLES SWINTON and
JACK GARRELL, Deputy Commissioner,
U.S. Department of Labor
Office of Workmen's Compensation Programs,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN C. DUNCAN, III
Suite 1010
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Petitioners

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

CITATIONS

Cases:

Statutes:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

J. FRANK KELLY, INC., and
HARTFORD ACCIDENT & INDEMNITY COMPANY,
Petitioners,

v.

CHARLES SWINTON and
JACK GARRELL, Deputy Commissioner,
U.S. Department of Labor,
Office of Workmen's Compensation Programs,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, J. Frank Kelly, Inc., and Hartford Accident and Indemnity Company pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 3, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto (1a-22a), as do the opinion

and order of December 3, 1973, of United States District Court Judge Thomas A. Flannery (23a) and the compensation order of June 20, 1972, entered by Deputy Commissioner Jack Garrell, United States Department of Labor, Office of Workmen's Compensation Programs which was the subject of court review (24a-28a).

JURISDICTION

The District Court had jurisdiction under 33 U.S.C. §921. The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 3, 1976, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Did the United States Court of Appeals for the District of Columbia Circuit, in reversing a Deputy Commissioner's denial of a back disability under the Longshoremen's and Harbor Workers' Compensation Act, as made applicable to the District of Columbia, exceed the proper scope of appellate review and misinterpret the presumption contained in §20(a) of the Act by holding that the presumption was one of compensability which extended to the issue of medical causal connection?

STATUTES INVOLVED

United States Code, Title 33:

§920. Presumptions

"In any proceeding for the enforcement of a claim for compensation under this chapter it shall be

presumed, in the absence of substantial evidence to the contrary –

"(a) That the claim comes within the provisions of this chapter.

"(b) That sufficient notice of such claim has been given.

"(c) That the injury was not occasioned solely by the intoxication of the injured employee.

"(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

"Mar. 4, 1927, c. 509, § 20, 44 Stat. 1436."

District of Columbia Code:

"§36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

"The provisions of Chapter 18 of Title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, §1)

Effective Date

"Section 3 of the Act of May 17, 1928, provided that: 'This Act [adding this section and section 36-502] shall take effect July 1, 1928."

STATEMENT OF THE CASE

On May 12, 1969, Charles Swinton was injured while working for J. Frank Kelly, Inc., in the District of Columbia when he fell off of a truck while unloading a beam. As a result of that incident, Hartford Accident and Indemnity Co., the workmen's compensation carrier for the employer, voluntarily paid temporary total disability benefits under the District of Columbia Workmen's Compensation Act (hereinafter Act) to the claimant through June 22, 1969. Thereafter the employee filed claim under the Act seeking additional benefits for a back disability as of February 3, 1970. A formal evidentiary hearing was held before Jack Garrell, Deputy Commissioner, U.S. Department of Labor, Office of Workmen's Compensation, on July 29, 1971, and May 12, 1972.

On June 20, 1972, Deputy Commissioner Garrell issued a compensation order rejecting the claim for a back disability. Suit was then commenced by the claimant against the employer and Deputy Commissioner in the United States District Court for the District of Columbia pursuant to 33 U.S.C. §921, in an effort to have the Deputy Commissioner's compensation order set aside. Upon cross-motions for summary judgment filed by the parties, District Court Judge Thomas A. Flannery upheld the Deputy Commissioner's determination by order and opinion dated December 3, 1973.

The claimant then appealed to the United States Court of Appeals for the District of Columbia Circuit which, in an opinion rendered on February 3, 1976, reversed both the Deputy Commissioner and the District Court. The Court concluded, upon a review of the administrative record, that the Deputy Commissioner had erred in rejecting the disability claim because he failed to utilize the presumption found in 33 U.S.C. §920(a) that, in the absence of substantial evidence to the contrary, it is presumed that a claim comes within the provisions of the Act. The opinion interpreted that section of the Act as providing a presumption of compensability which extended to medical causal connection, and since the Deputy Commissioner's rejection of the alleged back disability was based on circumstances which it characterized as being of a negative nature, his decision was clearly erroneous.

The testimony before the Deputy Commissioner disclosed that on May 12, 1969, Charles Swinton was employed as a checker for J. Frank Kelly. While unloading a truck with a 30 foot steel beam, he fell off of the truck with an 8 foot beam in his hands and was injured. The next day, Mr. Swinton was seen by Dr. Louis Lowman, a general practitioner, complaining about pain in his chest and stating that he hit his rib cage on one of the beams in the truck.

Although Dr. Lowman testified that Mr. Swinton complained about an injury to his back on his initial visit, the doctor's office notes failed to reveal any complaint of a back injury. The doctor did record, at this time, paravertebral spasm in the lumbosacral region of the patient's spine. Dr. Lowman testified that x-rays were taken of the claimant's ribs (to rule out the possibility of a fracture) and right knee, and a urinalysis and CBC were done to rule out possible internal injuries. There were no x-rays taken of the claimant's lumbosacral region.

During two subsequent visits in May of 1969, there were no references in the doctor's office notes to the claimant's back. When Dr. Lowman was shot on May 26, 1969, Mr. Swinton then came under the care of Dr. Frederick Hartsock at the Farragut Workmen's Compensation Clinic.

On May 24, 1969, before starting treatment with Dr. Hartsock, Mr. Swinton completed and returned to the workmen's compensation carrier a form requesting information pertaining to his accident. There, in response to an inquiry as to the full nature of the injury, the claimant stated, "Right knee, right ribs, left hand".

On May 28, 1969, Dr. Hartsock first saw Mr. Swinton. At that time Mr. Swinton did not tell the doctor that he had sustained an injury to his back, nor did he relate any complaints referrable thereto. The claimant remained under Dr. Hartsock's care until June 20, 1969, when he was told he could return to work. Although x-rays and treatment were rendered to other parts of the patient's person, no complaint was ever voiced or treatment given to Mr. Swinton's back during that period. When the claimant next returned to Dr. Hartsock in March of 1970, he related back complaints to him for the first time.

The claimant's history of injury was also taken by Dr. Hartsock's office nurse, Linda Dillingham, and, although he related that he had hurt his right knee, ribs, elbow and left hand in the May 12, 1969, accident, there was no indication by Mr. Swinton of any injury to his back. Mrs. Dillingham further recalled that on July 14, 1969 Mr. Swinton called the clinic and stated that he felt fine, and that they could discharge him, which they did. She also stated that the clinic's office records contained no notation of back complaints or treatment to Mr. Swinton's back during that time framework.

The testimony of Colonel Tom Simon of the D.C. National Guard was also presented at the hearing. He testified that during a two week National Guard summer retreat from June 21, 1969, to July 5, 1969, Charles Swinton had engaged in a field training program which included such diverse activities as engaging in bivouacs, carrying back packs, firing rifles, field anti-infiltration and anti-guerrilla combat training as part of an aggressor force, and evacuating the wounded, in addition to his regular duties as a band member. During this period, the National Guard records showed no instances of Charles Swinton being sick, ill, incapacitated, or excused from any of the foregoing activities. They did show, by contrast, that Mr. Swinton had been sick from May 17, 1969, through June 14, 1969, but he did leave with his unit, as scheduled, on June 21, 1969.

After summer camp was concluded, Mr. Swinton attended numerous regularly scheduled drills at the D.C. Armory in the late summer and fall of 1969, and he was also required to attend extra drills due to the riots and disorder which were occurring during that period in the District of Columbia. As a matter of fact, the claimant's duties for the National Guard were consuming so much of his time that in December of 1969, he resigned for the express purpose of being able to put in more time for J. Frank Kelly. From the time when the claimant returned from summer camp in July of 1969, until February of 1970, Mr. Swinton continued to perform his regular job duties for Kelly.

On February 4, 1970, Mr. Swinton saw Dr. Louis Lowman again. The doctor's office records for that date revealed that the claimant wanted to have his back evaluated since he was having pain. Dr. Lowman conducted an admittedly cursory examination, and he suggested that

it was time for the claimant to have an orthopedic examination. As of that visit, Dr. Lowman did not make any definitive diagnosis as to the etiology of Mr. Swinton's back difficulties, but instead this was left up to Dr. Julius Neviaser, the orthopedist to whom the claimant was being referred. That doctor was not called to testify by the claimant and there was no medical testimony presented linking the claimant's back problems with his fall of May 12, 1969.

At the hearing before Deputy Commissioner Garrell, benefits were sought for temporary total disability from February 4, 1970, to the hearing date and continuing, as a result of a back injury which Mr. Swinton alleged was due to his fall of May 12, 1969.

The Deputy Commissioner, however, sitting as the trier of fact, found,

> "That the credible, factual and medical evidence established that the complaint of back pain which first became manifest in February, 1970, and any back condition attributed thereto were not caused, aggravated, accelerated or adversely affected by the injury of May 12, 1969; . . .",

and benefits were denied.

REASONS FOR GRANTING WRIT

I

TO RESOLVE CONFLICT BETWEEN FEDERAL COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT, APPLICABLE SUPREME COURT PRECEDENT AND DECISIONS FROM OTHER FEDERAL CIRCUITS INVOLVING AN IMPORTANT QUESTION OF FEDERAL LAW AFFECTING THE PROPER AND UNIFORM ADMINISTRATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

The decision of the United States Court of Appeals for the District of Columbia Circuit should be reviewed because it erroneously interpreted the presumption provisions of 33 U.S.C. §920(a) of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter Act) as made applicable to employment in the District of Columbia, in such a fashion as to be in direct conflict with Supreme Court precedent explaining the purpose of that section, and federal appellate decisions from other circuits. The scope of the decision in the instant case as to the role of the statutory presumption and burden of proof cast upon the parties at a contested hearing is far reaching in that if followed by administrative law judges and the Benefits Review Board, the initial reviewing body, it will affect the uniformity of the Act which is national in character. This is particularly true where the appeals procedure outlined in 33 U.S.C. §921 envisions a second review by the Federal Court of Appeals where the injury occurred and those decisions do not adhere to principles espoused by the District of Columbia Circuit.

The relevant portion of the statute under consideration, which has remained intact without amendment since its passage in 1927, provides, as follows:

"§920. Presumptions

"In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary –

"(a) That the claim comes within the provisions of this chapter . . ."

The holding by the District of Columbia Circuit in the present case is that this language amounts to a presumption of compensability, which presumption extends to all facets of a claim, including medical causation. As the Court stated in the instant case,

> "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim. Indulging the presumption its legitimate role, it was the employer's burden to come forward with substantial evidence countering the presumed relationship between Swinton's accident and his disability." (13a, 14a)

Petitioners submit that the presumption applies to jurisdiction, and possibly to coverage of work activity, but not to the merits of a claim for disability.

(a) *Conflict with Supreme Court Precedent.* The purpose of the foregoing statutory presumption was first outlined by Mr. Justice Black in the case of *Davis v. Department of Labor of Washington,* 317 U.S. 249 (1942). There, a workman was drowned while in the performance of his employer's contract to dismantle a drawbridge, and the Supreme Court was called upon to determine whether or not the State of Washington, consistent with the Federal Constitution, could make an award under its state compensation law to the decedent's widow. Thus, the jurisdictional interplay between state compensation laws and Federal law was brought into focus.

The *Davis* opinion noted that after the Supreme Court had struck down workmen's compensation legislation in *Southern P. Co. v. Jensen,* 244 U.S. 205 (1917), Congress, some five months later, passed another statute which attempted to give injured persons whose duties were partly on land and partly on navigable waters rights and remedies under the workmen's compensation law of any state. That effort was declared unconstitutional in *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1922).

On June 10, 1922, Congress passed another law designed to permit state compensation laws to protect the waterfront workers, but this also was held to be invalid. *Washington v. W.C. Dawson & Co.,* 264 U.S. 219 (1924). Then, on March 4, 1927, the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.,* was enacted. In the *Davis* case, *supra,* it was observed that the jurisdictional dilemma posed by the interplay of state and Federal workmen's compensation statutes was equally applicable to employers and employees.

The Court then stated at page 256,

> "There is, in light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent, who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great – indeed, presumptive – weight to the con-

clusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy.

"There we are aided by the provision of the federal act, 33 USCA §920, which provides that in proceedings under that act, jurisdiction is to be 'presumed in the absence of substantial evidence to the contrary'. Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in *Parker v. Motor Boat Sales Co., supra.*"

The Court then went on to conclude that the Washington State Compensation Act was not unconstitutional.

The Supreme Court next addressed the §920(a) presumption in the case of *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947). There death benefits under the District of Columbia Workmen's Compensation Act were awarded to the widow of Clarence Ticer, the Deputy Commissioner specifically finding that the injury in Virginia leading to Mr. Ticer's death arose out of and in the course of his employment.

The claim was controverted by the employer and carrier on the basis that the Deputy Commissioner did not have jurisdiction of the claim and that the decedent's injury did not arise out of and in the course of his employment. It was contended instead, that jurisdiction for the

claim vested solely with the Virginia Industrial Commission.

The evidence showed that Ticer, a District of Columbia resident, had been working as an electrician for three years before his injury at the Quantico Marine Base in Quantico, Virginia, for an electrical contractor which did work in the District of Columbia. At the end of one work day, Ticer was driving home from work when, while still in Virginia, a stone struck his car's windshield and killed him.

In discussing the jurisdictional contention advanced, the Court stated,

> "We are aided here, of course, by the provision of §20 of the Longshoremen's Act that, in proceedings under that Act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary' – a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis v. Department of Labor Industries*, 317 U.S. 249, 256, 257, 87 L. Ed. 246, 250, 251, 63 S. Ct. 225. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.
>
> "The jurisdiction of the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it 'shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death

> occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person." (33 U.S. 474)

The final Supreme Court decision specifically involving the §20(a) presumption was *O'Keeffee v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359 (1965). There an employee who was working for an engineering company in South Korea on a 365 day basis drowned while boating on a South Korean lake. In determining whether or not the decedent's work activity was within the coverage of the Act, the Court invoked the presumption in §20(a) and noted that this was in accord with the rationale in *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, (1951) that if the obligations or conditions of employment operated to create a zone of special danger out of which the injury arose, then the employee's service was within the ambit of employment.

From an analysis of the foregoing authorities it is clear that the presumption in §20(a) that, in the absence of substantial evidence to the contrary, a claim is presumed to come within the provisions of this chapter, is meant to encompass jurisdictional and coverage questions as to the applicability of the Act. It has never been interpreted by the Supreme Court to encompass all of the facets of a claim and to presume that Congress intended that sort of a result is contrary to the history and background referenced in authorities cited above.

In fact the appellate decision here makes no reference to the *jurisdictional* presumption language in either *Davis v. Department of Labor of Washington*, 317 U.S. 249 (1942) or *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947),

but rather seizes on the more general language in *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965), in the context of statutory coverage, and converts this into a presumption of compensation for all purposes. Such a leap is not warranted by Supreme Court precedent and review is requested to remedy this misconception.

Petitioners respectfully submit that the District of Columbia Circuit's interpretation of the presumption in §20(a) is clearly erroneous, is in conflict with the aforementioned Supreme Court authorities and the decision herein should be reversed.

(b) *Conflict with Decisions from other Federal Circuits.*

The holding by the District of Columbia Circuit that the Act's presumption in §20(a) is a presumption of compensability is squarely at odds with the views of other Federal Courts of Appeals.

For example, in the case of *Eschbach v. Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950), the employee contended that his tuberculosis condition resulted from or was caused by his employment. In discussing the §20(a) presumption, the Seventh Circuit stated,

> "In the hearing before the Deputy Commissioner the burden was on the plaintiff to prove the facts necessary to sustain his claim other than those facts which §20 of the Act, 33 U.S.C.A. §920, provides shall be presumed unless there is substantial evidence to the contrary. The fact as to the causal connection between the employment and the injury is not one which is to be so presumed. The burden was, therefore, on the plaintiff to prove such fact." (181 F.2d 364)

* * * * * * * * * *

"The plaintiff's brief seems to contend that the burden was on the employer and the insurance carrier to show that the plaintiff's condition did not arise from his employment, or was not aggravated by his employment, and that upon the question of the employer's knowledge, there should have been positive evidence from the employer that it did not know claimant's condition arose out of, or was claimed to have been caused by, his employment. The plaintiff states that:

" 'They are legally charged with what they should know or should suspicion from the facts, and the Commissioner cannot make an inference totally unsupported by any positive evidence that the employer did not know these facts.' " (181 F.2d 864)

These contentions were rejected by the Court, and the Deputy Commissioner's denial of the claim was reinstated by the Court.

Numerous decisions from the Second Circuit have also come to the same conclusion. The case of *Gooding v. Willard*, 209 F.2d 913 (2nd Cir. 1954), involved a situation where a worker tripped and fell, and his chest struck a metal lunch box he was carrying. A rib was broken near his heart causing pain. The claimant eventually died of heart problems and the widow applied for death benefits under the Longshoremen's Act.

The Court initially discussed the permissible scope of judicial review and determined that there was substantial evidence to support the rejection of the claim by the Deputy Commissioner. It then observed,

"We might let decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the appellee. It is obvious, of course, that in point of fact it either was or was not a contributing cause. However, in point of proof of causal connection, the conclusion of the trial judge that the finding of no causal connection was inadequately supported by the evidence leaves the appellee's burden undischarged. The finding of no causal connection went unnecessarily far in positive terms, but whether or not it went unjustifiably far on the evidence, it was at least an expression of the determination of the Commissioner that the evidence was short to show affirmatively a causal connection between the accident and the death. It is abudantly clear that the evidence on the subject was so conflicting that the Commissioner could reasonably have found that there was no preponderance in favor of the appellee. As no more was needed to support his decision, it was error to set it aside."

This decision was followed in the case of *Nardi v. Willard*, 156 F. Supp. 425 (D.N.Y. 1957), where the court had occasion to review a Deputy Commissioner's denial of death benefits due to heart disease. The widow relied, among other things, on the case of *Friend v. Britton*, 95 U.S. App. D.C. 139, 220 F.2d 820, cert. denied, 350 U.S. 836 (1955). The Court in response, observed at page 429,

> "Moreover, it may be said in passing that in the *Friend* case the court was of the view that in a review of this character, 'doubts, including the factual, are to be resolved in favor of the employee or his dependent family.'

"In *Gooding v. Willard, supra,* the Court of Appeals for this Circuit took a somewhat different view stating:

"'. . . that the burden to show that the accident was a contributing cause of the death is on the appellee [the claimant].'

"The presumption in favor of the claimant contained in §920 of the Longshoremen's and Harbor Workers' Compensation Act has not 'the attribute of evidence in the claimant's favor.' Its only office is to control the result where there is an entire lack of competent evidence. *Del Vecchio v. Bowers,* 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229. Where competent evidence has been introduced by the carrier on the question of lack of causal connection between the accident and the death, presumption drops out and the question must be determined by the Deputy Commissioner on the basis of all the evidence before him. *Gooding v. Willard, supra; Eschbach v. Contractors, Pacific Naval Air Bases,* 7 Cir., 181 F.2d 860; *Pillsbury v. Liberty Mutual Insurance Co.,* 9th Cir., 143 F.2d 807; *Liberty Mutual Insurance Co. v. Gray,* 9th Cir., 137 F.2d 926; *Pate Stevedoring Corp. v. Henderson,* D.C. S.D. Ala., 44 F.Supp. 12; Cf. *Southern Pacific Co. v. Sheppeard,* 5th Cir., 112 F.2d 147; *Robinson v. Bradshaw,* 92 U.S. App. D.C. 216, 206 F.2d 435."

In *John W. McGrath Corp. v. Hughes,* 264 F.2d 314 (2nd Cir. 1959), although the Court upheld an award of compensation benefits to the widow of the employee who had suffered a heart attack while working, it stated, at page 317,

"We cannot, as defendants seem to urge, consider the presumption in the Longshoremen's Act, as having the quality of independent affirmative evidence. We believe that plaintiffs offered sufficient proof to rebut that presumption and consequently it must fall out of the case. It cannot be weighed with defendants' evidence against plaintiffs' since 'its only office is to control the result where there is an entire lack of competent evidence.' *Del Vecchio v. Bowers,* 1935, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229."

The Second Circuit, in its most recent pronouncement in the case of *Overseas African Construction Corp. v. McMullen,* 500 F.2d 1291 (2nd Cir. 1974), again adhered to its view that the presumption contained in §20 was a presumption of jurisdiction.

The First Circuit's view of the proper application of the §20(a) statutory presumption is found in the case of *Travelers Insurance Co. v. Belair,* 412 F.2d 297 (1st Cir. 1969). At page 301, in footnote 6, the Court observed,

"Both parties seem to misunderstand the applicability of the statutory presumption of coverage, 33 U.S.C. §920(a). Travelers suggests that, although certain evidence apparently favorable to Melanson was not only corroborated by uncontradicted, the Commissioner was not obliged to accept it. Where the evidence for the claimant appeared reasonable on its face and was totally unimpeached, Travelers' contention is directly contrary to the spirit of the Act embodied in the special presumption. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 1965, 380 U.S. 359, 85 S. Ct. 1012, 13 L. Ed. 2nd 895.

The government, on the other hand, seems to believe that when evidence against the claimant is equally substantial and undisputed the commissioner could disregard it by an explicit or implicit finding of insubstantiality on the basis of the presumption. This is not the law. See *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, 346, cert. den. *McCullough v. Travelers Insurance Co.*, 389 U.S. 1050, 88 S. Ct. 780, 19 L. Ed. 2nd 842. Once the employer has satisfied his burden of going forward, either in the course of his or the claimant's case, the presumption falls. *Del Vecchio v. Bowers*, 1935, 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229; *John W. McGrath Corp. v. Hughes*, 2 Cir., 1959, 264 F.2d 314, cert. denied 360 U.S. 931, 79 S. Ct. 1451, 3 L. Ed. 2d 1545. We then apply the substantial evidence test to the record as a whole without reference to the presumption. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 508, 71 S. Ct. 470, 95 L. Ed. 483; *Davis v. Department of Labor*, 1942, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246; *Michigan Mutual Liability Co. v. Arrien*, 2 Cir. 1965, 344 F.2d 640, cert. denied 382 U.S. 835, 86 S. Ct. 80, 15 L. Ed. 2d 78."

The Fourth Circuit's presumption concept was first outlined in the case of *Furlong v. O'Hearne*, 144 F. Supp. 266 (D. Md. 1956), involving a back claim. The Court said, at page 271,

> "The presumption in §920(a) does not relieve the claimant of the necessity of proving injury. *Eschbach v. Contractors, Pacific Naval Air Bases*, 7th Cir., 181 F.2d 860, 864; *Larson*, op. cit., §10.33, §80.33. See also *Del Vecchio v. Bowers*, 296 U.S. 280, 286, 56 S. Ct. 190, 80 L. Ed. 229."

In a *per curiam* affirmance, the Circuit Court of Appeals stated, "We find no error in the decision of the District Court and we believe that nothing of importance could be added to the opinion of the trial judge . . ." *O'Hearne v. Furlong*, 240 F.2d 958 (4th Cir. 1957).

In a later decision by the same District Court judge, *Sykes v. O'Hearne*, 181 F. Supp. 368 (D. Md. 1960), the Court stated at page 370:

> "I do not mean to imply that without evidence of a prior injury the decision should be in favor of the claimant. The burden was on the claimant to prove his injury. *Furlong v. O'Hearne*, D.C.D. Md., 144 F. Supp. 266, 271, affirmed 4 Cir., 240 F.2d 958; *Gooding v. Willard*, 2 Cir., 209 F.2d 913; *Kwasizur v. Cardillo*, 3 Cir., 175 F.2d 235, cert. denied, 338 U.S. 880, 70 S. Ct. 150, 94 L. Ed. 540."

In the Fifth Circuit case of *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), involving a cancer death allegedly due to fertilizer exposure, the Court reiterated the requirement that the burden of showing that the accident caused an acceleration of the death of the employee was on the claimant. The later case of *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), continued to adhere to that view. There the Court said at page 188,

> "Under §33 U.S.C. §903(a), the claimant has the burden of proving all that is not presumed under §920. See *Eschbach v. Contractors, Pacific Naval Air Bases*, 7th Cir., 1950, 181 F.2d 860. §920 does not presume an injury so the claimant must

prove its existence. *Sykes v. O'Hearne*, D. Md. 1960, 181 F. Supp. 368. 371.

The Ninth Circuit also appears to adopt the concept that the §20(a) presumption applies to whether or not coverage is afforded under the Act rather than to any presumption of compensability. *Liberty Mutual Insurance Co. v. Gray*, 137 F.2d 926 (9th Cir. 1943); *Pillsbury v. Liberty Mutual Insurance Co.*, 143 F.2d 807 (9th Cir. 1944); and *O'Leary v. Puget Sound Bridge and Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965).

Petitioners respectfully suggest that the District of Columbia Circuit's position on the §20(a) presumption is in direct conflict with the interpretation of the other federal circuits referenced above, is clearly erroneous and should be reviewed. Indeed the opinion in the present case does not cite one case outside of the District of Columbia to support its proposition that the presumption in the Act is one of compensability.

(c) *To Insure Uniformity in Administration of Longshoremen's Act.* The presumption issue presented by this case is one that extends significantly beyond the particular parties involved herein, and has national import in the various compensation districts throughout the country where the Longshoremen's and Harbor Workers' Compensation Act is administered. Indeed, after an Administrative Law Judge renders a decision, 33 U.S.C. §921 establishes a right of review by the Benefits Review Board, and then an appeal is taken to the United States Court of Appeals for the circuit in which the injury occurred. Thus, if there is a conflict in the circuits, as referenced above, uniformity in administration of the Act will be jeopardized, depending upon the fortuitous circumstances as to which circuit Court of Appeals will review the record made below.

Ample illustration of this problem can be found in the case of *Leyton v. Capital Reclamation Corp.*, 2 BRBS 24 (1975). There the Administrative Law Judge, relying on *Eschbach v. Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950), determined that the claimant had the burden of establishing that the injury which he complained of was causally related to his employment, and since that burden had not been met, his claim for temporary total disability benefits as a result of an alleged back injury was rejected. The Benefits Review Board, embracing the District of Columbia Circuit's view, reversed, and stated:

> "However, this Board adheres to the overwhelming body of case law holding that the burden is initially on the employer to come forward with substantial evidence to meet the presumption that injury occurring during employment was caused by that employment. See *Del Vecchio, supra, Wheatley, supra; Butler, supra; Continental Insurance v. Byrne*, 471 F.2d 257 (7th Cir. 1972).
>
> "Therefore, the issue before the Board is whether there is substantial evidence in the record to dispel the presumption of compensability found in §20(a) of the Act. We hold that there is not."

Also see *Hoff v. United Fruit Co.*, 2 BRBS 229 (1975).

An even more recent indication as to the extent to which the Board is applying the §20(a) presumption is found in *Norat v. Universal Terminal and Stevedoring Corp.*, 3 BRBS 151 (1976). There the Administrative Law Judge had denied benefits for disability alleged to be due to carbon dioxide exposure. The basis for the denial was due to a lack of causal connection between the claimant's illness and his employment. The Board held that the Administrative Law

Judge had improperly placed the burden of proof of compensability on the claimant and reversed.

Another example of the gross distortion now being applied to the presumption is found in the case of *Gutierrez v. Giant Food Stores*, 3 BRBS 204 (1976). There an employee, while working as a meat cutter, sustained an injury resulting in the amputation of a portion of both fingers. Compensation was paid voluntarily for temporary total disability and for a permanent partial disability to the claimant's right hand. Benefits were thereafter sought for temporary total disability for an additional nine-month period because of finger and stomach pain – the claimant having developed an ulcer approximately two months after the accident.

The Administrative Law Judge found that the employee's inability to work during the nine months in question was not due to the original accident or residuals of same.

In its reversal, the Board again made reference to the presumption under §20(a) of the Act and stated at page 206,

> "The presumption of compensability (grounded in the humanitarian nature of the Act) reflects a strong legislative policy favoring awards in arguable cases.
>
> "Here, the claimant did not work for approximately nine months (June, 1970, to March, 1971) but had been steadily employed both before and since that time. Claimant testified that the pain in his stomach and the fingers were the reason for the period of unemployment and sought temporary total disability benefits therefor. Only when the employer comes forward with substantial evidence is the presumption of compensability overcome.

> *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966). Although there was some evidence that claimant's ulcer was not causally related to his hand injury, the record contains no evidence that the hand alone was not at least a simultaneous cause of claimant's unemployment or that the Administrative Law Judge questioned the credibility of claimant. In the absence of such substantial evidence, the presumption controls the result. *McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1959)."

The decisions of the Administrative Law Judges who must hear contested cases also reflect a lack of uniformity as to the proper function of the presumption in §20(a). In the case of *Plante v. General Dynamics*, 1 BRBS 9 (ALJ) (1975), the claimant sustained a knee injury in 1971, and he later claimed a knee and back injury for which additional benefits were sought. The Administrative Law Judge noted that the Act's presumption that a claimant's injury arose out of and in the course of his employment did not extend to a presumption of the injury itself, and accordingly, disability compensation could only be awarded where the claimant satisfies the burden of proving all alleged injuries. No appeal was taken from that decision.

In the case of *Pareja v. Facilities Management Corp.*, 3 BRBS 98 (ALJ) (1975), a claim for death benefits was asserted as a result of a cancer condition. No direct evidence was offered as to whether the death arose out of and in the course of the employment, and there was no evidence that the employment created a zone of danger which gave rise to the cancer. The claimant rested solely on the presumption contained in §20(a) of the Act. The Administrative Law Judge held that the claimant had the

burden to establish a causai relationship between the death and employment. No appeal was taken from that decision.

For a claimed back injury espousing the same principle, see *Walls v. Sun Shipbuilding and Dry Dock Co.*, 2 BRBS 202 (ALJ) (1975).

By comparison, the following Administrative Law Judge decisions have interpreted the §20(a) presumption as requiring the employer to disprove the causal connection between the alleged injury or death and employment.

Holten v. Duluth Missabe and Iron Range RR Co., 3 BRBS 39 (ALJ) (1975), and *Russell v. Todd Shipyards*, 3 BRBS 57 (ALJ) (1975).

It can thus be seen that there currently exists a lack of uniformity even at the hearing level as to when the §20(a) presumption comes into play. The problem, however, of necessity also spills over into the conduct of the hearing involving such matters of procedure and burden of proof. May the claimant simply come in, put his written claim into evidence and rest? Can he merely complain of pain and relate medical problems he has experienced since his industrial accident and thereby shift the burden of disproving those contentions to the employer and carrier? Are all aspects of a claim now presumed to be compensable such as determination of average weekly wages, dependency, timely filing of a claim, accidental injury, occupational disease, employment status, medical causation connection, nature and extent of disability, loss of wage earning capacity, etc.? It is submitted that the presumption was never intended to reach these issues and that the ultimate burden of proof is to rest with the claimant.

In light of the foregoing, petitioners pray that this court grant the writ of certiorari applied for to resolve the proper role and scope of tine §20(a) presumption.

II

TO INSURE PROPER SCOPE OF JUDICIAL REVIEW IN ACCORDANCE WITH ESTABLISHED SUPREME COURT PRECEDENT

The Supreme Court has held in numerous decisions that where the evidence before the Deputy Commissioner, in a workmen's compensation case, permits the drawing of adverse inferences, his determination as fact-finder is to be sustained on appeal unless it is forbidden by law or irrational. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162 (1933); *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Deputy Commissioner's finding must be affirmed if supported by substantial evidence on the record considered as a whole. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459 (1968).

These principles were followed by the District of Columbia Circuit in the case of *Wolf v. Britton*, 117 U.S. App. D.C. 209, 328 F. 2d 181 (1964), where a denial of death benefits was upheld in a situation where the deceased workman had struck his head on a floor following a non-employment related seizure.

It is submitted that the decision rendered in this case ignores these basic precepts and because of its desire to achieve what it considers to be a humanitarian result, the Court, in effect, reweighed the evidence presented before the Deputy Commissioner and substituted its own judgment as to the decision which he should have arrived at. This is contrary to the Supreme Court's limitations on review as referenced above.

To borrow from Judge Tamm's dissent in *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 188, 407 F. 2d 307, 318 (1968):

> "My deep concern about the majority opinion is that in an effort to achieve a humanitarian result my learned and well intentioned brethren are ignoring all established precedents and virtually placing this type of case on a basis of compassion. I readily recognize the liberal philosophy of the courts in construing workmen's compensation laws, but I cannot subscribe to a doctrine of superior credibility of claimant's witnesses or of inherent suspicion toward those witnesses, lay and professional, who testify adversely to the claim. . . . As too frequently happens on this court, the majority completely ignores the superior opportunity which the trier of facts, in this case the Deputy Commissioner, had to observe the witnesses in person, evaluate their manner of testifying and compare their relative characteristics before arriving at a determination of their credibility. Instead the majority opinion displays an extraordinary cerebral capacity in evaluating conflicting testimony on the basis of a cold printed record. They do so despite our ruling that 'it is of no consequence that we might have reached a different conclusion or that there is a sharp conflict in the testimony or even that the evidence preponderates strongly against the view expressed by the Deputy. We cannot substitute our judgment for the Deputy's judgment, *nor can we weigh the evidence.*' (Emphasis supplied.) *Groom v. Cardillo*, 73 App. D.C. 358, 359, 119 F.2d 697, 698 (1941). The series of cases in this field that will result from

> today's opinion, will produce a brouhaha lacking foundation and logic, organization in reason and justification on any legal basis. The resulting paraselenae will negate the realism of proceeding before the Deputy Commissioner and dissolve the significance of any bona fide defense to a workmen's compensation claim."

Judge Tamm's lament, quoted above, now appears to have reached fruition as the Benefits Review Board's opinion in a recent decision reflects. In the case of *Norat v. Universal Terminal and Stevedoring Corp.*, the Administrative Law Judge rejected a claim for additional temporary total disability benefits. 2 BRBS 11 (ALJ) (1975). A summary of the decision indicates that the claimant was injured while loading bananas from a vessel, and while so working, some carbon dioxide fell on his face and body. The Administrative Law Judge, upon consideration of the record as a whole, was not persuaded that the claimant's exposure to the carbon dioxide caused the injury and disability claimed. He reasoned that the presumption under §20(a) of the Act did not relieve the claimant of the necessity of proving the causal connection between his employment and the injury.

This determination was reversed by the Benefits Review Board in 3 BRBS 151 (1976). The Board, in its opinion, conceded that the Administrative Law Judge had recognized that there was a presumption of compensability in the Act, but, nonetheless he had still imposed upon the claimant the burden of proving a causal connection between his illness and his employment. The medical evidence, although viewed in a light most favorable to the claimant, had been found by the trier of fact, to be uncertain on the matter of causation. With the evidence in that state, the Board held that the claimant was entitled to have doubts resolved

in his favor, and since the judge had doubt in his mind on the causation issue, it was improper to resolve that issue against the claimant.

The Board then stated, at page 157,

> "Having considered the §20(a) presumption to be inapplicable, or to have been rebutted, the Administrative Law Judge found that the substantial evidence test was to be applied to the record as a whole in his weighing the evidence presented by the parties in order to derive a conclusion. This standard is not applicable to evaluation of evidence by an Administrative Law Judge. The substantial evidence test clearly applies only to review of a decision of an Administrative Law Judge by an appellate body. Further, in finding that, 'the evidence must persuade the trier of fact of a disputed proposition,' the Administrative Law Judge clearly placed the burden of proof of compensability of his illness on the claimant rather than placing the burden of overcoming the presumption of compensability on the employer."

It is submitted that those statements by the initial reviewing tribunal under the Act are wholly at odds with the prior Supreme Court decisions previously cited in this section and contrary to the express language of the statute.

As long ago as the case of *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), the Supreme Court discussed the proper role of the presumption which is found in §20(d) of the Act, in the context of a claim for death benefits where the defense was one of suicide. The Act provided then, as it does now, that:

> "In any proceedings for the enforcement of the claim for compensation . . . it shall be presumed,

> in the absence of substantial evidence to the contrary – * * * (d) that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."

The Court, in clearly holding that that presumption did not have the quality of affirmative evidence, stated, at page 286,

> "The act under consideration, however, does not leave the matter to be determined by the general principles of law, but announces its own rule, to the effect that the claimant, in the absence of substantial evidence to the contrary, shall have the benefit of the presumption of accidental death. The employer must rebut this prima facies. The statement in the act that the evidence to overcome the effect of the presumption must be substantial adds nothing to the well understood principle that the finding must be supported by evidence. Once the employer has carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in the claimant's favor. Its only office is to control the result where there is an entire lack of competent evidence. If the employer alone adduces evidence which tends to support the theory of suicide, the case must be decided upon that evidence. Where the claimant offers substantial evidence in opposition, as was the case here, the issue must be resolved upon the whole body of proof pro and con; and if it permits an inference either way upon the question of suicide, the Deputy Commissioner, and he alone, is empowered to draw the inference; his decision as to the

weight of the evidence may not be disturbed by the court."

In the present case the Deputy Commissioner was called upon to decide if Charles Swinton had a back disability as a result of his accident of May 12, 1969. After considering the record as a whole, which included medical and lay testimony, benefits were denied. Testimony was presented which, in part, showed the following:

(1) No complaint of a back injury by the claimant to the workmen's compensation carrier in a form which he completed in May of 1969.

(2) No history of a back injury was given in May or June of 1969 by the claimant to his second treating physician, Dr. Hartsock, or to the doctor's office nurse.

(3) Although whirlpool treatments were given for the claimant's leg problems in May and June of 1969, there was no treatment rendered for any back condition by any doctor during that year.

(4) Performance by the claimant of rigorous National Guard duties for two weeks in late June and early July, 1969, with no complaint made of back problems, nor any slip given excusing the claimant from these duties.

(5) Upon return from National Guard duty, the claimant telephoned the compensation clinic where he was being treated, indicated that he felt fine, and could be discharged, which he was.

(6) Upon return from the National Guard retreat, the claimant returned to and performed his regular job duties for the employer during the remainder of 1969 and early 1970.

(7) During the summer and fall of 1969, the claimant performed his regular duties for the National Guard and attended extra drills due to disorder occurring in the District of Columbia.

(8) In December of 1969 the claimant resigned from the National Guard for the express purpose of putting in more time for his employer.

(9) No evidence was presented to establish that the claimant's back complaints in February of 1970 were due to his accident of May 12, 1969.

It is submitted that the foregoing evidence, with all reasonable inferences to be drawn therefrom, constitutes substantial evidence to support the Deputy Commissioner's rejection of the alleged back disability. In light of the previously stated Supreme Court guidelines respecting the limited scope of appellate review, which guidelines were mentioned and followed by the District Court Judge in affirming the denial, the decision of the panel in the instant case clearly exceeded the permissible scope of review. If encroachment of the fact-finder's evaluation of the evidence of the type engaged in here is permitted and encouraged, then there is little doubt but that the proceedings before a Deputy Commissioner will be rendered virtually meaningless.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

JOHN C. DUNCAN, III
1000 Connecticut Avenue, N.W.
Suite 1010
Washington, D.C. 20036
202-872-8411

Attorney for Petitioners

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1164

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION ACT, CHARLES SWINTON, APPELLANT

v.

J. FRANK KELLY, INC. (Employer), et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 1450-72)

Argued January 14, 1975

Decided February 3, 1976

Norman H. Heller for appellant.

John D. Duncan, III, for appellees J. Frank Kelly, Inc. and Hartford Accident & Indemnity Company.

Joshua T. Gillelan, II, Attorney, United States Department of Labor, with whom *Earl J. Silbert*, United States Attorney, and *George M. Lilly*, Attorney, United

States Department of Labor, were on the brief, for appellee Garrell.

Before WRIGHT and ROBINSON, *Circuit Judges*, and OSCAR H. DAVIS,* *Judge*, United States Court of Claims.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: We are summoned on this appeal to determine whether the denial of an employee's claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act [1] comports with statutory standards. At the administrative level, the employee's effort to obtain a disability award for his ailing back succumbed to a finding that it was not causally related to his prior job-connected accident. An action ensuing in the District Court to set that decision aside foundered on a summary judgment in favor of the employer. Our review of those proceedings leads us to conclude that in neither forum was the Act's presumption of compensability [2] given its just due. Accordingly, we reverse.

I

Appellant Charles Swinton was employed by appellee J. Frank Kelly, Inc.,[3] for eighteen years. On May 12,

---

* Sitting by designation pursuant to 28 U.S.C. § 293(a) (1970).

[1] Act of March 4, 1927, ch. 509, 44 Stat. 1124, as amended, 33 U.S.C. § 901 *et seq.* (1970), made applicable to the District of Columbia, with exceptions not relevant here, by the Act of May 17, 1928, ch. 612, §§ 1, 2, 45 Stat. 600, as amended, D.C. Code §§ 36-501, 36-502 (1973). See *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).

[2] Longshoremen's and Harbor Workers' Compensation Act, § 20, 33 U.S.C. § 920 (1970).

[3] The other appellees are the employer's insurance carrier and the Deputy Commissioner whose decision is the subject of review.

1969, while on the job and in the process of positioning a three-hundred pound beam on a truck, he lost his footing, fell off the truck, and was knocked unconscious. On the next day, he went to the office of Dr. Louis E. Lowman, who found abrasions at several bodily points and, importantly, a muscle spasm in the lumboscral spine. Swinton remained under Dr. Lowman's care until May 26, when the doctor was shot and robbed, and forced to absent himself from practice for several months. When this occurred, Swinton was referred by his employer to the Farragut Clinic, where he was treated until he returned to his job on June 23.

Swinton continued to work until the following February. At that time, complaining of back pain, he returned to Dr. Lowman, who thereupon referred him to an orthopedist, Dr. Julius Neviaser. After an examination, Dr. Neviaser ordered x-rays of the back and prescribed diathermy treatment to be administered by Dr. Lowman. When, after a three-week period, this treatment did not alleviate Swinton's distress, Dr. Neviaser placed him in Prince George's Hospital for another three weeks. There he was kept in traction for about ten days, and on complete bed rest for the remainder of the period.

Swinton's last examination took place in September, 1970, at the office of Dr. Neviaser. Swinton was informed that surgery was necessary, but it was never performed because Swinton could not bear the expense. Thereafter, Swinton continued to complain of back pain and discomfort in his legs. Except for one day during the summer of 1970 when he tried to work but lasted only four hours, he has not engaged in gainful employment since March 6 of that year.

On March 30, 1970, Swinton filed a claim under the Longshoremen's and Harbor Workers' Compensation Act for total disability, attributing his back condition to his

fall from the truck.[4] At the hearing, before a Deputy Commissioner, there was no dispute as to the occurrence of the accident or the fact that any injuries associated with it arose out of and in the course of Swinton's employment.[5] Temporary total disability from May 14, 1969, to June 22, 1969, was not contested; compensation therefor had already been paid.[6] The focal issue was the extent of Swinton's injuries; specifically, whether his back problem was causally related to the mishap on the truck.

In his compensation order, the Deputy Commissioner rejected Swinton's claim for further benefits. He found

> 1. That the claimant did not suffer a back disability as a result of the injury of May 12, 1969.
>
> 2. The claimant's need for treatment and care of a back condition which became manifest in February, 1970, was neither causally related to nor the natural and unavoidable consequence of the injury sustained on May 12, 1969.[7]

Swinton then instituted an action in the District Court to set this determination aside. On cross-motions for

---

[4] Swinton asserts that his total disability began on March 7, 1970, but that, since an operation is necessary and its outcome is not certain, he is unable to determine whether the disability is permanent.

[5] As the Deputy Commissioner stated at the outset, "[t]he administrative file indicates that the occurrence of injury on [May 13, 1969] and notice thereof are not in dispute, and that the primary issues to be reserved [*sic*] include the nature and extent of causally related disability and loss of wages or wage-earning capacity due thereto; also liability for some medical expenses incurred by the claimant." Tr. 4.

[6] Swinton had received $400 for temporary disability for 5-5/7 weeks from May 14, 1969, to June 22, 1969, at the rate of $70 per week.

[7] App. Ex. A at 3.

summary judgment, the court upheld the Deputy Commissioner. Swinton now brings an appeal here.

II

Before considering the merits, we must address a jurisdictional problem, to which none of the parties has adverted.[8] In 1972, while Swinton's action remained pending in the District Court, Congress amended the Longshoremen's and Harbor Workers' Compensation Act.[9] Numerous changes were made, the most significant for our purposes being administrative reforms,[10] particularly the addition of a review stage to the administrative process.[11]

Congress created a three-member Benefits Review Board to resolve appeals from decisions of administrative law judges,[12] to whom the hearing functions previously

---

[8] "[A] court may at any time, even on its own accord, raise questions pertaining to its own jurisdiction." *In re Adoption of a Minor*, 94 U.S.App.D.C. 131, 133-134, 214 F.2d 844, 846-847, 47 A.L.R.2d 813 (1954). See also *Louisville & N. R.R.* v. *Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126, 127-128 (1908); *Weedon* v. *Gaden*, 136 U.S.App. D.C. 1, 4 n.20, 419 F.2d 303, 306 n.20 (1969); *Brooks* v. *Laws*, 92 U.S.App.D.C. 367, 379, 208 F.2d 18, 30 (1953).

[9] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 251 (1972). Unquestionably, the amendments apply to the District of Columbia. See note 1 *supra*.

[10] The amendments also upgraded benefits, extended coverage to protect additional workers, and provided a specific cause of action for damages against third parties.

[11] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 15(b), 33 U.S.C. § 921(b) (Supp. 1975).

[12] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 15(b), 33 U.S.C. § 921(b) (Supp. 1975.

performed by deputy commissioners were assigned.[13] The Board's decision is reviewable in the court of appeals for the circuit in which the injury occurred.[14] In establishing the new board, Congress evidently believed that two-tiered judicial review was no longer necessary,[15] and the provision for initial review in a district court was accordingly removed.[16] Thus the present two-step review process—board and court of appeals—replaces the previous procedure whereby one aggrieved by a deputy commissioner's decision first sought injunctive relief in a district court and, if unsuccessful, by appeal to the appropriate court of appeals.

Prior to the 1972 amendment of the Act, Swinton, having lost his disability claim before the Deputy Commissioner, came properly to the District Court. But, as we have stated, while the case remained unresolved in that court, the amendments were passed and became effective. Thus the question we face is whether, despite jurisdiction in the District Court when the action was filed, the subsequent legislation destroyed that jurisdiction, and in turn the power of this court to hear and decide the appeal.[17]

---

[13] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 14, 33 U.S.C. § 919(d) (Supp. 1975).

[14] Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 15(c), 33 U.S.C. § 921(b) (Supp. 1975).

[15] "The change in the judicial review provision is not explained in the legislative history, but one can reasonably assume it reflected a congressional judgment that the added opportunity for administrative review made the district court review unnecessary and potentially exhausting." D. Currie and F. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1, 36 (1975).

[16] Section 15 of the amending act replaces the old § 921(b) with the new § 921(b) relating to the Benefits Review Board.

The effect of a statutory amendment on pending litigation is ultimately a matter of congressional intent.[18] In this instance, however, both the legislative language and its history are noncommittal in that regard. We look, then, to judicial precedent and policy for guidance, and thereby are led to conclude that the procedure followed by Swinton was correct, and that our jurisdiction of his appeal remains intact.

A judicial preference for prospective as opposed to retrospective legislative endeavor is well entrenched. "Retroactivity," the Supreme Court has declared, "even when permissible, is not favored, except upon the clearest

---

[17] Undeniably, if the District Court lost jurisdiction, we also are without jurisdiction. *Bruner* v. *United States*, 343 U.S. 112, 116-117, 72 S.Ct. 581, 584-585, 96 L.Ed. 786, 790-791 (1952); *Smallwood* v. *Gallardo*, 275 U.S. 56, 62, 48 S.Ct. 23, 24, 72 L.Ed. 152, 156-157 (1927) (in the words of Justice Holmes, "it does not matter that these cases had gone to a higher Court. When the root is cut the branches fall."); *Hallowell* v. *Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 203, 60 L.Ed. 409, 410 (1916).

[18] *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141, 152-165, 65 S.Ct. 172, 179-185, 89 L.Ed. 139, 147-154 (1944); *Smallwood* v. *Gallardo*, *supra* note 17, 275 U.S. at 61, 48 S.Ct. at 23, 72 L.Ed. at 156; *United States* v. *St. Louis, S.F. & T. Ry.*, 270 U.S. 1, 3, 46 S.Ct. 182, 183, 70 L.Ed. 435, 437 (1926); *Hallowell* v. *Commons*, *supra* note 17, 239 U.S. at 508, 36 S.Ct. at 203, 60 L.Ed. at 410; *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314-315, 28 S.Ct. 537, 539-540, 52 L.Ed. 804, 807-808 (1908); *De Rodulfa* v. *United States*, 149 U.S.App.D.C. 154, 160, 461 F.2d 1240, 1246, 18 A.L.R. Fed. 890, *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972); *Sperry Rand Corp.* v. *FTC*, 110 U.S.App.D.C. 1, 3, 288 F.2d 403, 405 (1961).

mandate." [19] For "statutes are addressed to the future not to the past;" [20] those looking back encounter "the principles of our jurisprudence which are repellant to retrospective operation of a law and the repeal by implication of one law by another." [21] Consequently, "statutes are not to be applied retroactively 'unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied.'" [22]

This canon is as apropos to procedural as to substantive statutory amendments.[23] Since Congress evinced no particular intent in enacting the 1972 amendments of

[19] *Claridge Apartments Co.* v. *Commissioner*, *supra* note 18, 323 U.S. at 164, 65 S.Ct. at 185, 89 L.Ed. at 153; *Kalis* v. *Leahy*, 88 U.S.App.D.C. 166, 167-168, 188 F.2d 633, 634-635, *cert. denied*, 341 U.S. 926, 71 S.Ct. 797, 95 L.Ed. 1358 (1951); *Neild* v. *District of Columbia*, 71 App.D.C. 306, 314, 110 F.2d 246, 254 (1940).

[20] *Winfree* v. *Northern Pac. Ry.*, 227 U.S. 296, 301, 33 S.Ct. 273, 274, 57 L.Ed. 518, 520 (1913).

[21] *Ibanez de Aldecoa y Palet* v. *Hongkong & Shanghai Banking Corp.*, 246 U.S. 621, 625, 38 S.Ct. 410, 412, 62 L.Ed. 903, 906 (1918).

[22] *Boilermakers Int'l* v. *NLRB*, 114 U.S.App.D.C. 372, 374, 316 F.2d 373, 375 (1963), quoting *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, *supra* note 18, 209 U.S. at 314, 28 S.Ct. at 539, 52 L.Ed. at 807.

[23] *United States* v. *St. Louis, S.F. & T. Ry.*, *supra* note 18, 270 U.S. at 3, 46 S.Ct. at 183, 70 L.Ed. at 437; *United States Fidelity & Guar. Co.* v. *United States ex rel. Struthers Wells Co.*, *supra* note 18, 209 U.S. at 315-317, 28 S.Ct. at 540, 52 L.Ed. at 807-808; see *Bruner* v. *United States*, *supra* note 17, 343 U.S. at 117 n.9, 72 S.Ct. at 584 n.9, 96 L.Ed. at 791 n.9. Of course, where congressional intent is clear, courts will apply the statute retroactively. *Bruner* v. *United States*, *supra* note 17; *Smallwood* v. *Gallardo*, *supra* note 17; *Hallowell* v. *Commons*, *supra* note 17; *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 18 L.Ed. 540 (1867).

the Act, we hold that they leave unaffected the litigation now before us. Indeed, the wisdom of the judicial preference and the conclusion it dictates is apparent in cases such as the present. Swinton had exhausted all administrative remedies available to him at the time he instituted suit in the District Court. To require him now to abandon his three-year quest for judicial relief, and to reenter the administrative process simply because a new administrative review step has been inaugurated, would obviously involve a great waste of time, energy and money. Surely if Congress had thought that such a price was warranted, it expectably would have said so unequivocally. We have no such expression by Congress, and we are satisfied that Swinton need not return to the administrative forum.

These considerations lead also to the conviction that the District Court did not lose jurisdiction over challenges to compensation orders brought before it prior to the effective date of the amendments. To conclude otherwise might well leave claimants like Swinton out of time for the new administrative review [24] and, as a result, without any review at all.[25] The fact is that there has always been an opportunity for judicial scrutiny of workmen's compensation decisions,[26] and Congress, in

[24] The Deputy Commissioner's order denying Swinton's claim for disability benefits was issued on June 20, 1972.

[25] Access to the courts of appeals comes only via review of the district court's judgment under the old law or by review of the Benefits Review Board under the new law. The courts of appeals have never had jurisdiction to review directly a deputy commissioner's award.

[26] The original legislation provided for judicial review. Longshoremen's and Harbor Workers' Compensation Act, § 21, as amended, 33 U.S.C. § 921 (1970). That provision remained in substantially the same form until enactment of its counterpart in the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972.

fashioning the 1972 amendments, obviously sought to improve the efficacy of the process. To say that Congress intended to deprive claimants caught in the amending interval of judicial oversight historically afforded all other claimants would border on the ridiculous. We find additional support for our position in the body of other cases adjudicated since the amendments. While none discusses the problem, the treatment uniformly accorded them harmonizes with the result we reach. In all cases where judicial review was sought before the effective date of the amendments, the courts have exercised jurisdiction.[27]

---

[27] *Overseas African Constr. Corp.* v. *McMullen*, 500 F.2d 1291 (2d Cir. 1974); *Rockport Yacht & Supply Co.* v. *Hollis*, 371 F.Supp. 1229 (S.D. Tex. 1973); *Leonard* v. *Walter*, 356 F.Supp. 56 (D.D.C. 1973); *Blackwell Constr. Co.* v. *Garrell*, 352 F.Supp. 192 (D.D.C. 1972). See also *Sun Shipbuilding & Dry Dock Co.* v. *Bowman*, 371 F.Supp. 365 (E.D. Pa. 1974), *rev'd*, 507 F.2d 146 (3d Cir. 1975); *Dillingham Corp.* v. *Massey*, 505 F.2d 1126 (9th Cir. 1974). While it is always hazardous to speculate why a court did not adhere to an issue, it is hard to believe that all of these courts overlooked the problem.

In *Overseas African Constr. Corp.* v. *McMullen, supra*, the court was concerned with the retroactive effect of the new provision for attorney's fees. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 13(a)-(c), 33 U.S.C. § 928(a)-(c) (Supp. 1975). In deciding that fees incurred subsequent to the amendments were covered by the new legislation, the court was obviously cognizant of the fact that the claimant had instituted his review proceeding in the district court prior to the amendment's effective date, and that the district court's decision was not issued until a year thereafter. Despite this awareness and the focus on the intervening amendments, the court never mentioned the issue with which we are concerned. The most plausible explanation for this omission is that the court recognized the problem but did not deem it sufficiently substantial to warrant discussion.

In cases in which the Deputy Commissioner's award was issued after the effective date of the amendments, the new

After careful consideration of the problem, then, we are constrained to maintain the same course here. The constructional canon favoring prospective application of amending legislation, the folly and inequity of returning Swinton to the administrative process, and the absence of any countervailing authority combine to persuade us to hold that the District Court's jurisdiction, and in turn our own, were untouched by the statutory changes.

III

We turn now to the merits of Swinton's appeal, mindful that judicial review of workmen's compensation proceedings is limited,[28] but also that a compensation order

---

review procedure was followed; that is, the claimant went first to the Benefits Review Board and then directly to the court of appeals. *Matthews* v. *Walter*, —— U.S.App.D.C. ——, 512 F.2d 941 (1975); *S. H. DuPuy* v. *Director, Office of Workers' Compensation Programs*, 519 F.2d 536 (7th Cir. 1975). In these cases as well, the propriety of this procedure is not questioned. See also *McCord* v. *Benefits Review Board*, —— U.S.App.D.C. ——, 514 F.2d 198 (1975), where a modification request pursuant to 33 U.S.C. § 922 (1970) made after the effective date was transferred to an administrative law judge in accordance with the procedure of the new § 919. These results are not inconsistent with our holding; on the contrary, they are in accord with our logic. Where the claimant can take advantage of the new administrative review methodology without duplicity of effort or delay, it is appropriate that he do so. As remedial legislation, it may be applied immediately, "[a]bsent some contrary indications by the Congress and absent any procedural prejudice to either party." *Denver R. G. W. R.R.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563, 87 S.Ct. 1746, 1750, 18 L.Ed. 2d 954, 960 (1967); *Ex parte Collett*, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, 10 A.L.R.2d 921 (1949); *Pruess* v. *Udall*, 123 U.S.App.D.C. 301, 359 F.2d 615 (1965).

[28] *O'Leary* v. *Brown-Pacific Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 472, 95 L.Ed. 483, 487 (1951); *Cardillo* v. *Liberty Mut. Ins. Co., supra* note 1.

must be set aside if insufficiently supported by substantial evidence.[29] We are advertent, too, to the congressional requirement that "it . . . be presumed, in the absence of substantial evidence to the contrary, . . . [t]hat the claim comes within the provisions of" the Act.[30] As we have heretofore characterized this mandate, "the Act . . . presume[s], in the absence of substantial evidence to the contrary, . . . a claim comes within [rather than outside its] provisions";[31] put another way, that the employer must rebut "this prima facies" with substantial countervailing evidence.[32]

The insuperable flaw in the case at bar is that it nowhere appears in the administrative record that the Deputy Commissioner accorded this presumption the respect it commands. We are satisfied that if the presump-

---

[29] *Mitchell* v. *Woodworth*, 146 U.S.App.D.C. 21, 23, 449 F.2d 1097, 1099 (1971); *Wheatley* v. *Adler*, 132 U.S.App.D.C. 177, 180, 407 F.2d 307, 310 (*en banc* 1968); *J. V. Vozzolo, Inc.* v. *Britton*, 126 U.S.App.D.C. 259, 262, 377 F.2d 144, 147 (1967); *Butler* v. *District Parking Management Co.*, 124 U.S.App.D.C. 197, 199, 363 F.2d 682, 684 (1966); *Howell* v. *Einbinder*, 121 U.S.App.D.C. 312, 313-314, 350 F.2d 442, 443-444 (1965); *Robinson* v. *Bradshaw*, 92 U.S.App.D.C. 216, 220, 206 F.2d 435, 439, *cert. denied*, 346 U.S. 899, 74 S.Ct. 226, 98 L.Ed. 400 (1953).

[30] "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter. . . ." Longshoremen's and Harbor Workers' Compensation Act, § 20, 33 U.S.C. § 920 (1970).

[31] *Wheatley* v. *Adler*, *supra* note 29, 132 U.S.App.D.C. at 182, 407 F.2d at 312, quoting *O'Keefe* v. *Smith, Hinchman, & Grylls Associates*, 380 U.S. 359, 363, 85 S.Ct. 1012, 1015, 13 L.Ed.2d 895, 898 (1965).

[32] *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286, 56 S.Ct. 190, 193, 80 L.Ed. 229, 232-233 (1935).

tion had been honored, the Deputy Commissioner would have had to find that it was not overcome by substantial evidence. Therefore, we cannot permit the compensation order under attack to stand.[33]

As noted by the Deputy Commissioner, there is no doubt that Swinton fell from the truck on May 12, 1969, or that any resulting injury arose out of and in the course of his employment. That element of cause and effect was never in issue. The controversy has involved only the second step of causation—whether Swinton's back infirmity and consequent disability, now concededly existent, were byproducts of the fall. The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim.[34] Indulging the presumption its

---

[33] Swinton makes a second argument for reversal, urging that the District Court erred in refusing to consider, as a ground for setting aside the Deputy Commissioner's award, the claim that the back condition was an occupational disease. Finding that Swinton did not raise this claim before the Deputy Commissioner, the District Court refused to consider it. In view of our reversal on the evidence issue, we need not consider this contention.

[34] This court has frequently drawn upon the presumption to assist a determination as to whether a particular malady was causally connected with job-related activity. See *Mitchell* v. *Woodworth*, *supra* note 29, 146 U.S.App.D.C. at 23, 449 F.2d at 1100; *Wheatley* v. *Adler*, *supra* note 29, 132 U.S. App.D.C. at 182-184, 407 F.2d at 312-314; *J. V. Vozzolo, Inc.* v. *Britton*, *supra* note 29, 126 U.S.App.D.C. at 265, 377 F.2d at 150; *Butler* v. *District Parking Management Co.*, *supra* note 29, 124 U.S.App.D.C. at 196-197, 363 F.2d at 683-684; *Howell* v. *Einbinder*, *supra* note 29, 121 U.S.App.D.C. at 315, 350 F.2d at 445; *Wolff* v. *Britton*, 117 U.S.App.D.C. 209, 212, 328 F.2d 181, 184 (1964); *Hancock* v. *Einbinder*, 114 U.S.App.D.C. 67, 71, 310 F.2d 872, 876 (1962); *General Accident Fire & Life Assurance Corp.* v. *Donovan*, 102 U.S. App.D.C. 204, 206, 251 F.2d 915, 917, *reconsideration denied*, 102 U.S.App.D.C. 207, 251 F.2d 961 (1958); *Travelers Ins.*

legitimate role, it was the employer's burden to come forward with substantial evidence countering the presumed relationship between Swinton's accident and his disability.

That, we find, was not done. There was no evidence directly controverting the existence of such a relationship. No witness expressed the opinion that the back injury was not precipitated or aggrevated by Swinton's tumble from the truck.[35] There was no testimony pointing to another agency; there was no showing of pre-fall or post-fall trauma.[36] In sum, there was nothing whatever to indicate any other cause for Swinton's aching back.

Co. v. *Donovan*, 95 U.S.App.D.C. 331, 333-334, 221 F.2d 886, 888-889 (1955); *Vandemia* v. *Cristaldi*, 95 U.S.App.D.C. 230, 232, 221 F.2d 103, 105 (1955); *Robinson* v. *Bradshaw*, *supra* note 29, 92 U.S.App.D.C. at 219-220, 206 F.2d at 438-439; *Travelers Ins. Co.* v. *Cardillo*, 78 U.S.App.D.C. 255, 257, 140 F.2d 10, 12 (1943); *Hartford Accident & Indem. Co.* v. *Cardillo*, 72 App.D.C. 52, 54-59, 112 F.2d 11, 13-18, *cert. denied*, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940); *Maryland Cas. Co.* v. *Cardillo*, 71 App.D.C. 160, 163, 107 F.2d 959, 962 (1939); *New Amsterdam Cas. Co.* v. *Hoage*, 61 App.D.C. 306, 307-309, 62 F.2d 468, 469-471 (1932), *cert. denied*, 288 U.S. 608, 53 S.Ct. 400, 77 L.Ed. 982 (1933).

[35] Appellees point out that neither did Swinton present any expert opinion contending the accident did cause the back condition. It was not, however, the claimant's burden to do that unless and until the employer presented sufficient evidence to rebut the presumed causal connection. While it is true that the presumption is not itself evidence, and once rebutted "falls away," nevertheless it must first be rebutted. *Del Vecchio* v. *Bowers*, *supra* note 32, 296 U.S. at 286, 56 S.Ct. at 193, 80 L.Ed. at 232-233; *Hancock* v. *Einbinder*, *supra* note 34. See cases cited *supra* note 29.

[36] Swinton testified that he was involved in no accidents between June, 1969, when he resumed work, and February, 1970, when he returned to Dr. Lowman.

The Deputy Commissioner's decision rested almost entirely on circumstances of a negative character.[37] He found that Swinton "was medically discharged and resumed employment with the employer on June 23, 1969; [and] that during the ensuing 8 months he satisfactorily performed his regular and overtime heavy lifting duties with no known complaints of back pain and no indicated need for treatment of a back condition."[38] He further found that Swinton spent two weeks—June 21 to July 5, 1969—with the District of Columbia National Guard and that during that period he did not seek to be excused from rifle range practice, bivouacs, fire fighting drills or simulated combat tests, and did not voice any feeling of discomfort.[39] Likewise, appellees in their brief point only to essentially the same kind of negative evidence. They remind that both the physician and the nurse at Farragut Clinic testified that Swinton, shortly after the accident, never mentioned back pain in his description of symptoms,[40] and that it was not until

---

[37] See, however, text *infra* at notes 49-50.

[38] App. Ex. A. at 2.

[39] *Id.*

[40] The nurse who took Swinton's history when he first came to Farragut Clinic on May 28, 1969, testified that neither on that visit nor on his June 20, 1969, visit did he indicate that he had injured his back; he reported injuries to his right knee, right ribs, right elbow, and left hand. The clinic's treatment consisted only of whirlpool therapy for his right knee. Dr. Frederick Hartsock, the clinic physician who treated Swinton also testified that he had no knowledge of a back injury prior to March, 1970, and that the main problem was Swinton's right knee. He noted that Swinton had mentioned his right rib injury and the fact that he was under treatment by Dr. Lowman; Dr. Hartsock, however, "didn't go into the rib problem because it wasn't stressed." Tr. at 140.

months later that the clinic became aware of those pains.[41]

This court, sitting *en banc* in *Wheatley* v. *Alder*,[42] recognized that negative evidence, although inadequate in that case, may in some circumstances become informative. As we illustrated, "[i]f a man has no blood in the sputum, no cough, no weakness, no headache, no elevation of temperature or pulse, no stuffiness or pain in the chest —then from all these facts, a doctor can say 'with reasonable medical certainty,' or as a matter of some probability, that this man does not have pneumonia." [43] Stated otherwise, the statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event. It cannot be said, however, that the evidence in this case rose to that level. Here, as in *Wheatley*, no medical expert offered any opinion as to causality; no expert espoused a view that the back ailment was not bred or intensified by his fall. And surely the evidence, such as it was, did not of its own force serve to disestablish the possible affinity of the two.

The caliber of proof, if circumstantial, which the statutory presumption demanded is shaped in part by the fact that here, as in *Wheatley*, the thesis that Swinton's current affliction arose from the accident is "not a mere fancy or wisp of 'might have been.'"[44] Dr. Lowman

---

[41] When Swinton came to the clinic in March, 1970, for his back ailment, Dr. Hartsock "[did] not go into the problem" since he was being treated by both an orthopedic specialist, Dr. Neviaser, and his family doctor, Dr. Lowman. Tr. at 139.

[42] *Supra* note 29.

[43] 143 U.S.App.D.C. at 183, 407 F.2d at 313, quoting testimony in the case.

[44] *Id.*

testified, and his records confirmed, that on Swinton's very first visit—on the day after the fall—there was "some spasm of the muscles in the lumbosacral spine," and further explained that such spasms are "usually due to some type of injury, or traumatic injury." [45] At the time of that first visit, it was his opinion that Swinton had strained the muscles of the lumbosacral spine; nevertheless, he decided not to x-ray the spine immediately, preferring to first rule out the possibility of a ribcage fracture, a procedure which the doctor's forced absence from practice disrupted.[46] Six months later, as Dr. Lowman also testified, enough had emerged to warn that Swinton may have sustained a more severe injury to his back.[47] This body of evidence lends credence to the presumption that Swinton's back problem had its origin in the fall from the truck—that the present condition is "but episodic in the sequence of consequences flowing from the [1969 fall]." [48]

The only other evidence from which appellees seek support is Dr. Lowman's first "Attendant Physician's Report," dated September 16. 1969, in which he answered "No" to the question "Will there be permanent

---

[45] Tr. at 76-77.

[46] "No x-rays were made of the lumbosacral region at that time because . . . [I believed] that we [should] rule out the possibility of the ribcage fracture first, and then we'd work on the lumbosacral spine. But we never got to that [because] on the 26th of May I was robbed and shot." Tr. at 78.

[47] See text *infra* at notes 49-50.

[48] *J. V. Vozzolo, Inc.* v. *Britton*, *supra* note 29, 126 U.S. App.D.C. at 264, 377 F.2d at 149. This court is not unfamiliar with medical case histories involving a back injury originally thought to be merely a strain but subsequently discovered to be worse. See *Stancil* v. *Massey*, 141 U.S. App.D.C. 120, 436 F.2d 274, 14 A.L.R. Fed. 390 (1970).

defect or facial head disfigurement?" [49] The significance of this response must, however, be assessed in light of his subsequent "Attendant Physician's Report" on March 18, 1970. In the latter, as Dr. Lowman testified at the hearing, he changed his initial opinion on the basis of later orthopedic consultation, and revised his response to the question to advise, with respect to possible permanent injury, that "it's undetermined and it depends on orthopedic follow-up." [50] We perceive no conflict between that position and the statutorily presumed fact that Swinton's back disorder was a consequence of his accident.

We cannot accept the presentation made by appellees, and relied on by the Deputy Commissioner, as evidence capable of overtaking the statutory presumption. "Substantial evidence," this court has reiterated, "is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " [51] We think the evidence in question cannot survive that test. It is not inconsistent with the proposition that Swinton injured his back when he fell from the truck; it suggests no more than that the full extent of the injury was not immediately medically recognizable. It was not accompanied by other evidence tending to prove that Swinton's back problem is of a type that ordinarily would have become manifest more readily.[52] The evidence is further

---

[49] Tr. 97. While apparently neither this report nor the report referred to in note 50 *infra*, was ever introduced into evidence, their existence and content are not contested.

[50] Tr. 98, 103-104. See note 49 *supra*.

[51] *Avignone Freres, Inc.* v. *Cardillo*, 73 App.D.C. 149, 150, 117 F.2d 385, 386 (1940), quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216-217, 83 L.Ed. 126, 140 (1938).

[52] While the Deputy Commissioner made much of the lack of early protestations of back pain by Swinton, App. Ex. A at 2, we have held that mere failure to complain may

afflicted by the fact that the "record makes no substantial evidentiary disclosure that would support the proposition that the [back condition] was incited by anything outside the employment." [53] With gaps of this magnitude in the circumstantial evidence relied on to rebut the presumption, we must rectify the denial of Swinton's disability claim.

The Longshoremen's and Harbor Workers' Compensation Act "requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers." [54] It "operate[s] to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them." [55] Its fundamental purpose considered, the Act "is to be construed liberally for the benefit of employees and their dependents. In their favor doubts, including the factual, are to be resolved." [56]

---

be "a completely inadequate and insubstantial basis for" concluding that a causal link between accident and injury is nonexistent. *Howell* v. *Einbinder*, *supra* note 29, 121 U.S. App.D.C. at 314, 350 F.2d at 444.

[53] *J. V. Vozzolo, Inc.* v. *Britton*, *supra* note 29, 126 U.S. App.D.C. at 265, 377 F.2d at 150.

[54] *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414, 52 S.Ct. 187, 189, 76 L.Ed. 366, 369-370 (1932).

[55] *Id.*

[56] *J. V. Vozzolo, Inc.* v. *Britton*, *supra* note 29. 126 U.S. App.D.C. at 262, 377 F.2d at 147 (footnotes omitted). See also *Wheatley* v. *Adler*, *supra* note 29, 132 U.S.App.DC. at 184, 407 F.2d at 314; *Voris* v. *Eikel*, 346 U.S. 228, 333, 74 S.Ct. 88, 91-92, 98 L.Ed. 5, 10 (1953); *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, *supra* note 54, 284 U.S. at 414, 52 S.Ct at 189, 76 L.Ed. at 369-370; *Howell* v. *Ein-*

In like vein, the presumption controlling disposition of this case is "a presumption of compensability grounded in the 'humanitarian nature' of the Act." [57] We recognize that "[r]ebutting evidence may be hard to develop, given the limits of medical ability to reconstruct why 'something unexpectedly goes wrong within the human frame.'" [58] Nonetheless, as we have had occasion to observe, "that is precisely why the presumption was inserted by Congress. It signals and reflects a strong legislative policy favoring awards in arguable cases." [59] In the past, we have frequently drawn upon the presumption to assist a determination as to whether a particular malady was causally connected with employment-related activity.[60] And we have not hesitated to annul orders grounded on evidence too insubstantial to override the presumption.[61]

---

binder, supra note 29, 121 U.S.App.D.C. at 314, 350 F.2d at 444; *Hancock* v. *Einbinder, supra* note 34, 114 U.S.App. D.C. at 70, 310 F.2d at 875; *Phoenix Assurance Co.* v. *Britton*, 110 U.S.App.D.C. 118, 120, 289 F.2d 784, 786 (1961); *Friend* v. *Britton*, 95 U.S.App.D.C. 139, 141, 220 F.2d 820, 821, *cert. denied*, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 745 (1955).

[57] *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 182, 407 F.2d at 312, quoting *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, supra* note 29, 380 U.S. at 363, 85 S.Ct. at 1015, 13 L.Ed.2d at 898.

[58] *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 183, 407 F.2d at 313. The quoted language is from *Commercial Cas. Ins. Co.* v. *Hoage*, 64 App.D.C. 158, 159, 75 F.2d 677, 678, *cert. denied*, 295 U.S. 733, 55 S.Ct. 645, 79 L.Ed. 1682 (1935).

[59] *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 183, 407 F.2d at 312.

[60] See cases cited *supra* note 34.

[61] For other cases in this circuit reversing for insufficiency of the evidence to rebut the statutory presumption, see

The evidence in the case before us, at the very least, leaves the issue on causality wide open for serious debate. By the same token, our duty to abide the presumption is clear. "Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by the Act. . . . What the Act calls for is facts, not speculation, to overcome the presumption of compensability." [62] And "[w]e have made it clear that we 'will not sustain the administrative findings merely because they are substantiated by some isolated evidence.'" [63] "Our review," we said, "must also take account of the settled rule that the Act is to be construed with a view to its beneficient purposes. Doubts, including factual, are to be resolved in favor of the employee or his dependent family." [64]

On the administrative record, aided by the statutory presumption, the Deputy Commissioner erred in rejecting Swinton's disability claim. The District Court simi-

---

Mitchell v. *Woodworth, supra* note 29, 146 U.S.App.D.C. at 23, 449 F.2d at 1100; *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 182-194, 407 F.2d at 312-314; *Butler* v. *District Parking Management Co., supra* note 29, 124 U.S.App. D.C. at 196-197, 363 F.2d at 683-684; *Hancock* v. *Einbinder, supra* note 34, 114 U.S.App.D.C. at 71, 310 F.2d at 876; *Robinson* v. *Bradshaw, supra* note 29, 92 U.S.App.D.C. at 219-220, 406 F.2d at 438-439. See also *Howell* v. *Einbinder, supra* note 29, 121 U.S.App.D.C. at 315, 350 F.2d at 445; *Vendemia* v. *Cristaldi, supra* note 34, 95 U.S.App.D.C. at 232-234, 221 F.2d at 105-107.

[62] *Steele* v. *Adler*, 269 F.Supp. 376, 379 (D.D.C. 1967). See also *Mitchell* v. *Woodworth, supra* note 29, 146 U.S.App. D.C. at 23, 449 F.2d at 1100.

[63] *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 184, 407 F.2d at 314, quoting *Friend* v. *Britton, supra* note 56, 95 U.S.App.D.C. at 141, 220 F.2d at 822.

[64] *Wheatley* v. *Adler, supra* note 29, 132 U.S.App.D.C. at 184, 407 F.2d at 314.

larly erred in granting summary judgment for appellees. We reverse that judgment and remand the case to the District Court for entry in Swinton's favor of an appropriate summary judgment setting the Deputy Commissioner's compensation order aside.

Reversed and remanded.

APPENDIX B
ORDER

(Document No. 21, Filed December 3, 1973)

This matter came before the court on plaintiff's motion for summary judgment and defendant's cross motion for summary judgment.

The court, having considered the memoranda submitted in support thereof and in opposition thereto and the report of the proceedings before the Bureau of Employees' Compensation; and

It appearing that the findings of the Deputy Commissioner are entitled to great deference by the courts and must stand if supported by substantial evidence, *see O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Quick v. Martin*, 397 F.2d 644, 645 (D.C. Cir. 1968); and

It further appearing that administrative determinations will not be upset by the courts for reasons not fairly presented at the administrative level, *see Britton v. Great American Indemnity Co.*, 290 F.2d 381 (D.C. Cir. 1961); *Metropolitan Casualty Insurance Co. v. Hoage*, 89 F.2d 798 (D.C. Cir. 1937); and

It further appearing that plaintiff did not raise before the Deputy Commissioner the theory that plaintiff's back condition is the result of 18 years of continuous employment with defendant J. Frank Kelly, Inc., it is this *3rd* day of *December*, 1973,

ORDERED that plaintiff's motion for summary judgment be, and the same hereby is denied; and it is further

ORDERED, that defendants' cross-motion for summary judgment be, and the same hereby are, granted.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF WORKMEN'S COMPENSATION PROGRAMS
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act	COMPENSATION ORDER
CHARLES SWINTON Claimant	AWARD OF COMPENSATION
vs.	TEMPORARY TOTAL DISABILITY
J. FRANK KELLY, INCORPORATED Employer	———
HARTFORD ACCIDENT & INDEMNITY COMPANY Insurance Carrier	REJECTION OF CLAIM FOR BACK DISABILITY CASE NO. 37191

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on May 12, 1969, the claimant above named was in the employ of the employer above named, whose address is 2121 Georgia Avenue, Northwest, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes; "that the liability of the employer for compensation under the said Act was insured by the Hartford Accident & Indemnity Company;

2. That on the said day the claimant was performing services for the employer as a checker on a truck and while pulling a beam into position he lost his balance and fell off the truck to the ground with the beam; that as a consequence he suffered abrasions of his right knee, right rib cage, right elbow and left hand; that x-rays of the various areas showed no fracture or dislocation; that no x-rays were taken of the lumbosacral region; that the injury arose out of and in the course of the employment;

3. That written notice of the injury was not given to the employer within thirty days, but that the employer had knowledge of the injury within said period and has not been prejudiced by the lack of such written notice;

4. That by consent and stipulation of counsel for the respective parties the the average weekly wage at the time of the injury was $100;

5. That the employer furnished the claimant with medical services through June 20, 1969, in accordance with Section 7(a) of the Act; that the claimant responded favorably to a course of physical and whirpool therapy to the right knee and rib cage area; that he was medically discharged and resumed employment with the employer on June 23, 1969; that during the ensuing 8 months he satisfactorily performed his regular and overtime heavy lifting duties with no known complaints of back pain and no indicated need for treatment of a back condition; that for 2 weeks from June 21, 1969 through July 5, 1969, the claimant engaged in field training exercises, aside from participation as a trombone playing member of the band, in the District of Columbia National Guard, and made no complaints of back discomfort; that during the tour of guard duty at camp he did not report ill or request to be excused from rifle range pratice, bivouacs, fire-fighting drills and simulated combat tests; that

the claimant continued as an active member of the National Guard until December 2, 1969, when he voluntarily resigned from the National Guard because of financial commitments and loss of overtime work for the employer;

6. That the credible factual and medical evidence established that the complaints of back pain which first became manifest in February, 1970, and any back condition attributed thereto were not caused, aggravated, accelerated or adversely affected by the injury on May 12, 1969; that between February 4, 1970 and August 31, 1970, the claimant voluntarily secured the services of Dr. Louis E. Lowman and Dr. Julius S. Neviaser, without prior request of/or authorization by the employer and the insurance carrier; that the employer and the insurance carrier are not liable for the cost of the services rendered by said physicians for a back condition, which was not causally related to or necessitated by the injury on May 12, 1972;

7. That the claimant last worked for the employer on March 6, 1970, and since said date he did not apply for any available and suitable employment for which he is qualified and capable of performing; that for the past 1½ years he has been receiving Social Security disability benefits for the non-occupational back condition;

8. That as a result of the injury the claimant was wholly disabled from May 14, 1969 to June 22, 1969, inclusive, and for such temporary total disability he is entitled to compensation for 5 5/7 weeks at the rate of $70 per week in the amount of $400; that the employer and the insurance carrier have paid $400 to the claimant as compensation;

Upon the foregoing findings of fact, it is ordered that the claim for total disability benefits beginning March 7,

1970, be and the same is hereby REJECTED for the following reasons:

1. That the claimant did not suffer a back disability as a result of the injury on May 12, 1969.

2. The claimant's need for treatment and care of a back condition which became manifest in February, 1970, was neither causally related to nor the natural and unavoidable consequence of the injury sustained on May 12, 1969.

Upon the foregoing findings of fact, the Deputy Commissioner also makes the following

AWARD

That the employer, J. Frank Kelly, Inc. and the insurance carrier, Hartford Accident & Indemnity Company, shall pay compensation to the claimant as follows: For temporary disability, 5 5/7 weeks at the rate of $70 per week from May 14, 1969 to June 22, 1969, inclusive, in the amount of $400, which amount has been paid by the employer and the insurance carrier.

Given under my hand at Washington, D.C. this twentieth day of June, 1972.

/s/ Jack Garrell
Deputy Commissioner
District of Columbia Compensation District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by certified mail to the claimant, the

employer, the attorney for the claimant, insurance carrier and the attorney for the respondents at the last known address of each as follows:

NAME	ADDRESS
Mr. Charles Swinton	7235 Booker Drive Seat Pleasant, Maryland
J. Frank Kelly, Inc.	2121 Georgia Avenue, N.W. Washington, D.C.
Hartford Accident & Indemnity Co.	100 North Pitts Street Alexandria, Virginia 22314
Donald J. Chaikin, Esq.	1225 Connecticut Avenue, N.W. Washington, D.C.
John C. Duncan, III, Esq.	Southern Building Washington, D.C. 20005

/s/ Jack Garrell
Deputy Commissioner

Mailed: June 20, 1972